BANK BUMIPUTRA (M) BHD.

v.

DORIC DEVELOPMENT SDN. BHD.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[ORIGINATING SUMMONS NO. 31-1002-86]
27 DECEMBER 1986

CIVIL PROCEDURE: *Application for order for sale under s. 254 of the National Land Code - Whether to be filed only after the expiry of period specified in the notice of default in Form 16D - Whether non-compliance forms a legalistic and technical objection to set aside an order.*

This was an application for a summons for lands charged by the defendant in favour of the plaintiff to secure money lent to be sold by public auction etc.

The point taken by the defendant's Counsel was that an application for order for sale, under s. 254(3), (6) of the National Land Code could be filed only after the expiry of the period specified in the notice of default (Form 16D) for remedying the breach of the provisions in question of the charge.

The defendant's Counsel raised an objection based on failure on the part of the plaintiff to give one month's notice to defendant to remedy the breach in regard to the failure of repayment of money.

Held:

[1] The objection would appear to be highly legalistic and technical, designed for the purpose of delaying proceedings.

[2] The irregularity of filing the originating summons less than one month after service of notice of default did not go to the root of the rights of the plaintiff. Thus, even the failure by a chargee to specify in a notice of default, the time to remedy a breach is to be treated as an innocuous irregularity as was held by Barton J in *Tan Kai Kok v. Thor Teik Seng* [1935] MLJ 91 (purely technical objections "misled no one and would not avail to set aside an order otherwise good"- per Barton J)

[3] The learned Judge dismissed the objection raised by Counsel for the defendant and made the order in terms of the summons herein.

Case referred to:
Tan Kai Kok v. Thor Teik Seng [1935] MLJ 91

Legislation referred to:
Rules of the High Court 1980, O. 83 r. 3(6), (7)
National Land Code 1965, s. 254(3), 254

For the plaintiff - Ting Hui; M/s. Hong Chew King & Co.
For the defendant - T. Dhana; M/s. Zain & Co.

JUDGMENT

Peh Swee Chin J:

I have earlier made an order in terms of the summons herein for the lands in question and charged by the defendant in favour of the plaintiff to secure money lent to be sold by public auction etc. In doing so, I have dismissed a solitary point taken by the learned Counsel for the defendant.

The defendant's director in an affidavit filed therein, apart from the said solitary point, had raised also another objection based on the failure to comply with O. 83 r. 3(6) and (7) of the Rules of the High Court. This other objection was expressly dropped or abandoned by the defendant's Counsel at the hearing before me, with the result, that the solitary point alone need to be dealt with.

The point taken by Counsel was to the effect that by s. 254(3); (6), an application for order for sale could be filed only after the expiry of the period specified in the notice of default (Form 16D) for remedying the breach of the provisions in question of the charge.

Section 254 is now reproduced as follows:

> Section 254.(1) Where, in the case of any charge, any such breach of agreement as is mentioned in sub-section (1) of s. 253 has been continued for a period of at least one month or such alternative period as may be specified in the charge, the chargee may serve on the chargor a notice in Form 16D-
>
> (a) specifying the breach in question;
>
> (b) requiring it to be remedied within one month of the date on which the notice is served, or such alternative period as may be specified in the charge; and
>
> (c) warning the chargor that, if the notice is not complied with, he will take proceedings to obtain an order for sale.
>
> (2) Where, after the service of any such notice, the charged land or lease becomes vested in any other person or body, the notice shall be as valid and effectual against that person or body as it was against the person or body on whom it was served.
>
> (3) If at the expiry of the period specified in any such notice the breach in question has not been remedied -
>
> (a) the whole sum secured by the charge shall (if it has not already done so) become due and payable to the chargee; and
>
> (b) the chargee may apply for an order for sale in accordance with the following provisions of this Chapter:
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> Provided that para. (a) shall not apply to any charge to secure the payment of an annuity or other periodic sum.

The Form 16D, it will be seen from above, would have to, *inter alia*, require the breach to be remedied within one month of the date on which a notice is served, or such alternative period as may be specified in the charge.

Learned Counsel for the defendant submitted that the Form 16D herein was advertised in the "Star" on 5 June 1986 but the summons was filed on 1 July 1986, so that the plaintiff had given less than one month to the defendant to remedy the breach in regard to the failure of repayment of money. The advertisement was in fact not published in the "Star" in pursuance of any order of substituted service, but in order to found his objection of not giving 1 full month's time to remedy the breach to repay the money, the defendant and its Counsel implicitly adopted the stand that the Form 16D was treated as having been served on the defendant on 5 June 1986. Such being the case, it would be in-equitable to refer to the lack of an order of substituted service which was thus a "non-issue", by design and not oversight of the defendant.

The glaring fact was that a sum of nearly RM5.5 million owing by the defendant was never paid; not one dollar having been paid to account of the huge indebtedness. The conclusion was inevitable that the complaint of shortness of time i.e the lack of one full month's time to repay the money, was a highly legalistic and technical objection made for the purpose of delaying the proceedings.

Further, a notice of demand by letter was sent on 18 February 1985 by AR Registered post to defendant at its registered address, but it was returned unreceived, together with the AR Card left unsigned by the defendant, its servants or agents; it was not that some human being for whom the notice was intended had left the premises and therefore could not be served, but the defendant was a body corporate and it was sent to its registered address. Another similar notice was sent on 1 July 1985 by AR Registered post to defendant at its registered office and it met with the same fate. The conclusion was inevitable that as early as 18 February 1985 the defendant had been aware of the plaintiff attempting to reach the defendant through the plaintiff's solicitors, and the servants or agents of the defendant could not be left in my doubt that the plaintiff wanted its money back, otherwise why did the defendant return the letters unacknowledged? The defendant was playing hide-and-seek with the plaintiff, for the purpose of, *inter alia*, delaying the proceedings herein.

Further, it would be pertinent to stress that, by express provisions of the charge, money was repayable on demand (*vide* Clause 1 of the annexure to the charge).

Further, it would be also relevant to mention that by Clause 29 of the said annexure, in connection with the breach of any provisions of the charge continuing for period of not less than 7 days, it would be lawful for the plaintiff to give notice to remedy the breach within 7 days. The parties herein therefore had contracted for 7 days to be given for remedying a breach. The alternative period specified in the charge for insertion in the present Form 16D was 7 days.

In the light of what has been stated above, the objection would appear to be highly legalistic; and technical, designed for the purpose of delaying proceedings. Further, the defendant could not have been actually misled in view of, in particular, of the aforesaid hide-and-seek game played by the defendant, and the express provision of contractual period of 7 days for remedying the breach. For the same reason, the defendant could not have been prejudiced in any way.

Further still, the irregularity of filing the present originating summons a bit too early without waiting for the said one full month, after service of notice of default, to expire first, was not one that went to the root of the rights of the plaintiff. Thus even the failure by a chargee to specify, in a notice of default, the time to remedy a breach was treated as such an innocuous irregularity by Barton J in *Tan Kai Kok v. Thor Teik Seng* [1935] MLJ 91. In the course of his judgment, the learned Judge also said: "This order was attacked on many grounds ... I do not propose to deal with the purely technical objections, they misled no one and would not avail to set aside an order otherwise good."

For the reasons stated above, I dismissed the objection raised by Counsel and made the order in terms of the summons herein.

Also found at [1987] 1 CLJ 383